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Public Prosecutor v Romi bin Ali & Anor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05–31–02 OF 2014
VARGHESE GEORGE, VERNON ONG AND ZAMANI A RAHIM JJCA
22 SEPTEMBER 2015

C *Criminal Procedure — Appeal — Appeal by prosecution — Drug trafficking — Common intention — Whether accused persons had common intention of trafficking drugs — Whether proven — Whether element of trafficking established — Whether prosecution proved case beyond reasonable doubt — Dangerous Drugs Act 1952, s 39B(1)(a)*

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Upon receiving information pertaining to drug trafficking activities that were going to take place, the police had stationed at the said venue. A green Proton Iswara entered the scene and there were two persons inside it. The second respondent was the driver while the first respondent was the passenger at the E front seat. The respondents were arrested by the police. According to the police, the first respondent was attempting to flee. A black bag ('exh P37'), was found in the footwell of the front passenger seat where the first respondent was seated. Exhibit P37 had been placed close to the first respondent's legs and contained two plastic packets of 'Ali Café Power Root 5 Dalam 1'. In the first Ali Café F plastic packet, 11 translucent plastic packets containing crystalline substances suspected to be methamphetamines were found. In the second Ali Café plastic packet, two silver-coloured plastic packets containing similar crystalline substances suspected to be methamphetamines were found. The police proceeded to frisk the first respondent's body and found another two small G translucent plastic packets in the right front pocket of the jeans worn by the first respondent. These two small plastic packets also contained similar substance suspected to be the drugs methamphetamines. Nothing incriminating was found on the person of the second respondent, other than the keys of the motorcar. The keys were seized from him. Upon analysis by the H government chemist, it was confirmed that the substances were methamphetamines weighing a total amount of 1,115.96g. The first and second respondents were jointly charged with having a common intention of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). Another amended charge of possession of drugs punishable I under s 12(3) of the Act was proferred against the first respondent alone. The trial judge found that the prosecution failed to prove direct trafficking by 'transporting' under s 2 of the Act to constitute the offence of trafficking in dangerous drugs under s 39B(1)(a) of the Act. However, the trial judge found that a reasonable inference can be drawn that the first respondent had

knowledge of the drugs in exh P37, though His Lordship doubted the evidence of the police that the first respondent attempted to flee. The trial judge, however, found that the first respondent was having custody or control of exh P37 containing the drugs which was recovered from the footwell of the front passenger seat where the first respondent was seated. The first respondent, therefore, had possession and presumed knowledge of the drugs in exh P37 under s 37(d) of the Act. As against the second respondent, the trial judge found there was no evidence that he was in custody or control of the drugs in exh P37 as he was a mere driver of the motorcar which belonged to his wife's brother-in-law. The liability of the first respondent could not then be fastened or imputed to the second respondent based on the principle of common intention under s 34 of the Penal Code as there was insufficient evidence to prove any pre-arranged or pre-concerted plan. At the close of the prosecution's case, the trial judge reduced the trafficking charge against the first respondent to one of possession punishable under s 39A(2) of the Act. The first respondent pleaded guilty to the reduced charge and he was sentenced to 17 years imprisonment from the date of arrest and ten strokes of whipping. The first respondent also pleaded guilty to the amended charge of possession punishable under s 12(3) of the Act and he was sentenced to six months imprisonment to run from the date of arrest. As regard the second respondent, the trial judge found there was no evidence adduced by the prosecution to prove that the second respondent was in custody or control and having possession of the impugned drugs and thus, no prima facie case had been established against him. The second respondent was acquitted and discharged without being called to enter defence. Hence, the present appeal.

Held, remitting case against the first respondent back to the High Court for his defence to be called; affirming the second respondent's acquittal without having to call for his defence:

(1) The prosecution had proved trafficking by 'transporting' under s 2 of the Act, which was the reason for the reduction of the trafficking charge against the first respondent at the close of the prosecution's case to one of possession under s 39A(2) of the Act. The decision of the trial judge reducing the charge under s 39A(2) of the Act was set aside and the case against the first respondent was ordered to be remitted back to the High Court for his defence to be called on an amended trafficking charge under s 39B(1)(a) of the Act (see para 21).

(2) As against the second respondent, it was the trial judge's decision that the prosecution had failed to prove that he was in possession of the impugned drugs. The fitting exercise of the clothings found in exh P37 were carried out on both the respondents. The clothings did not fit the second respondent but fitted the first respondent. It was reasonable to infer that the clothings together with the drugs in exh P37 belonged to or were in the possession of the first respondent only (see para 22).

(3) The trial judge made a finding of fact that there was insufficient evidence adduced by the prosecution to prove that the second respondent was in custody or control of the drugs in exh P37. The trial judge also entertained serious doubt regarding the exact spot the second respondent was arrested and whether the second respondent did actually make an attempt to escape at the time of his arrest by PW5. The evidence of PW5 had contradicted the evidence of PW2 on this issue. Other than being the driver of the motorcar, there was no other evidence to show the second respondent's nexus with exh P37 and also his knowledge of the drugs in it. The prosecution evidence and the circumstances of the case was completely lacking to establish common intention between the second and the first respondent to jointly trafficking in the drugs (see para 24).

(4) The prosecution had failed to prove custody or control and presumed knowledge of the drugs under s 36(d) of the Act against the second respondent, let alone to fasten the second respondent with any 'common intention'. The trial judge decision to acquit the second respondent at the close of the prosecution's case was correct as no prima facie case of trafficking had been proven (see para 25).

[Bahasa Malaysia summary

Setelah menerima maklumat berkenaan kegiatan pengedaran dadah yang akan berlaku, pihak polis telah bersedia di tempat itu. Proton Iswara hijau telah memasuki tempat kejadian dan terdapat dua orang di dalamnya. Responden kedua ialah pemandu manakala responden pertama ialah penumpang di kerusi hadapan. Responden-responden telah ditangkap oleh polis. Menurut polis, responden pertama telah cuba melarikan diri. Satu beg hitam ('eksh P37'), telah ditemui di tempat letak kaki penumpang kerusi hadapan di mana responden pertama telah duduk. Ekshibit P37 telah diletakkan dekat dengan kaki responden pertama dan mengandungi dua bungkusan plastik 'Ali Café Power Root 5 Dalam 1'. Dalam bungkusan plastik pertama Ali Café itu, 11 bungkusan plastik telus mengandungi bahan kristal disyaki methamphetamine telah ditemui. Dalam bungkusan plastik kedua Ali Café dua bungkusan plastik berwarna perak mengandungi bahan kristal yang serupa disyaki methamphetamine telah ditemui. Polis kemudian telah memeriksa badan responden pertama dan menjumpai dua lagi bungkusan plastik kecil yang telus di dalam poket hadapan sebelah kanan seluar jeans yang dipakai oleh responden pertama. Kedua-dua bungkusan plastik kecil itu juga mengandungi bahan serupa disyaki dadah methamphetamines. Tiada apa-apa yang mencurigakan ditemui pada badan responden kedua, selain daripada kunci-kunci kereta. Kunci-kunci itu telah dirampas daripadanya. Setelah dianalisis oleh ahli kimia kerajaan, ia disahkan bahawa bahan itu adalah methamphetamines yang keseluruhan jumlah seberat 1,115.96g. Responden-responden pertama dan kedua telah dituduh bersama dengan niat bersama mengedar dadah berbahaya di bawah s 39B(1)(A) Akta

DadahBerbahaya 1952 ('Akta tersebut'). Satu lagi pertuduhan yang dipinda berhubung milikan dadah yang boleh dihukum di bawah s 12(3) Akta tersebut dibuat terhadap responden pertama sahaja. Hakim perbicaraan mendapati bahawa pendakwaan telah gagal membuktikan pengedaran secara langsung melalui 'transporting' di bawah s 2 Akta tersebut untuk membentuk kesalahan pengedaran dadah berbahaya di bawah s 39B(1)(a) Akta tersebut, Walau bagaimanapun, hakim bijaksana mendapati bahawa inferens munasabah boleh dibuat bahawa responden pertama mempunyai pengetahuan tentang dadah itu dalam eksh P37, meskipun hakim bijaksana meragui keterangan polis bahawa responden pertama cuba melarikan diri. Hakim perbicaraan, bagaimanapun, mendapati responden pertama mempunyai jagaan atau kawalan eksh P37 mengandungi dadah yang dijumpai dari tempat kaki kerusi penumpang hadapan di mana responden pertama duduk. Responden pertama, dengan itu, mempunyai milikan dan pengetahuan yang dadah dalam eksh P37 di bawah s 37(d) Akta tersebut. Terhadap responden kedua, hakim bijaksana mendapati tiada keterangan bahawa dia mempunyai jagaan atau kawalan dadah itu dalam eksh P37 kerana dia hanya pemandu kereta yang dimiliki adik ipar isterinya. Liabiliti responden pertama tidak boleh dengan itu mengikat atau dikatakan ke atas responden kedua berdasarkan prinsip niat bersama di bawah s 34 Kanun Keseksaan kerana terdapat keterangan mencukupi untuk membuktikan apa-apa rancangan yang telah diatur terlebih dahulu. Di penutup kes pendakwaan, hakim perbicaraan mengurangkan pertuduhan pengedaran terhadap responden pertama kepada pertuduhan milikan yang boleh dihukum di bawah s 39A(2) Akta tersebut. Responden pertama telah mengaku bersalah terhadap pertuduhan yang dikurangkan itu dan dia telah dihukum penjara selama 17 tahun dari tarikh tangkapan dan sepuluh kali sebatan. Responden pertama juga mengaku bersalah terhadap pertuduhan yang dipinda berhubung milikan yang boleh dihukum di bawah s 12(3) Akta tersebut dan dia telah dihukum penjara enam bulan yang bermula dari tarikh tangkapan. Berhubung responden kedua, hakim perbicaraan mendapati tiada keterangan telah dikemukakan oleh pendakwaan untuk membuktikan responden kedua mempunyai jagaan atau kawalan dan mempunyai milikan dadah yang dipersoalkan dan oleh itu, tiada kes prima facie telah dibuktikan terhadapnya. Responden kedua telah dilepas dan dibebaskan tanpa dipanggil untuk memasuki pembelaan. Justeru, rayuan ini.

Diputuskan mengembalikan kes terhadap responden pertama ke Mahkamah Tinggi agar pembelaannya dipanggil; mengesahkan pelepasan responden tanpa memanggil pembelaannya:

(1) Pendakwaan telah membuktikan pengedaran melalui 'transporting' di bawah s 2 Akta tersebut, yang merupakan alasan untuk pengurangan pertuduhan pengedaran terhadap responden pertama di penutup kes pendakwaan kepada pertuduhan milikan di bawah s 39A(2) Akta tersebut. Keputusan hakim perbicaraan mengurangkan pertuduhan di

bawah s 39A(2) Akta tersebut telah diketepikan dan kes terhadap responden pertama telah diperintahkan untuk dikembalikan kepada Mahkamah Tinggi agar pembelaannya dipanggil atas pertuduhan pengedaran yang dipinda di bawah s 39B(1)(a) Akta tersebut (lihat perenggan 21).

(2) Terhadap responden kedua, ia adalah keputusan hakim perbicaraan bahawa pendakwaan telah gagal membuktikan bahawa dia pemilik dadah yang dipersoalkan. Sesi memakai pakaian yang dijumpai dalam eksh P37 telah dijalankan ke atas kedua-dua responden. Pakaian itu tidak muat pada responden kedua tetapi muat pada responden pertama. Ia adalah munasabah untuk membuat inferens bahawa pakaian itu bersama dadah dalam eksh P37 dimilik atau dalam milikan responden pertama sahaja (lihat perenggan 22).

(3) Hakim perbicaraan membuat penemuan fakta bahawa keterangan tidak mencukupi dikemukakan oleh pendakwaan untuk membuktikan bahawa responden kedua mempunyai jagaan atau kawalan dadah dalam eksh P37. Hakim perbicaraan juga mempunyai keraguan serius berkenaan tempat sebenar responden kedua ditangkap dan sama ada responden kedua memang cuba melarikan diri pada masa tangkapannya oleh PW5. Keterangan telah menentang keterangan PW2 berhubung isu ini. Selain daripada menjadi pemandu kereta itu, tiada keterangan lain menunjukkan responden kedua mempunyai kaitan dengan ekshibit P37 dan juga pengetahuannya tentang dadah dalamnya. Keterangan pendakwaan dan keadaan kes tidak dapat membuktikan niat bersama antara responden kedua dan responden pertama untuk mengedar bersama dadah itu (lihat perenggan 24).

(4) Pendakwaan telah gagal membuktikan jagaan atau kawalan dan andaian pengetahuan tentang dadah itu di bawah s 36(d) Akta tersebut terhadap responden kedua, apatah lagi mengikat responden kedua dengan apa-apa 'common intention'. Keputusan hakim perbicaraan untuk melepaskan responden kedua di penutup kes pendakwaan adalah wajar kerana tiada kes prima facie tentang milikan telah dibuktikan (lihat perenggan 25).]

Notes

For a case on appeal by prosecution, see 5(1) *Mallal's Digest* (5th Ed, 2015) para 492.

Cases referred to

Jamaluddin Saad & Anor v PP [2013] 1 LNS 481, CA (refd)
Jonaidi bin Mansor v PP [2002] 2 MLJ 111; [2002] 1 CLJ 730, CA (refd)
Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241; [2003] 2 CLJ 65, CA (refd)

Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64; [1980] 1 LNS 181, PC (refd)
PP v Mohd Bandar Shah bin Nordin & Anor [2008] 4 MLJ 556; [2008] 4 CLJ 859, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 12(3), 36(d), 37(d), 39A(2), 39B(1)(a), First Schedule
Penal Code s 34

Appeal from: Criminal Trial Nos TWU-45–6 & 7/6 of 2013 (High Court, Tawau)

Muhamad Yasser bin Mohd Nasri (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Ram Singh (Ram Singh Harbans & Co) for the first respondent.
Chau Chin Tang (Chau & Thien) for the second respondent.

Zamani A Rahim JCA:

INTRODUCTION

[1] Romi bin Ali, the first respondent and Rosliansa bin Kitley, the second respondent were jointly charged with having a common intention of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The trafficking charge against both of them reads:

> Bahawa kamu pada 4bh Februari 2013 lebih kurang jam 6.40 pagi bertempat di tebing Sungai Pasir Putih, Tanjung Batu, Logpond, di dalam Daerah Tawau, di dalam Negeri Sabah, dalam melaksanakan niat bersama, telah mengedar dadah berbahaya iaitu Methamphetamine seberat 1,155.96 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a)Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B (2) Akta yang sama dan dibaca bersama Seksyen 34 Kanun Keseksaan.

[2] Another amended charge of possession of drugs punishable under s 12(3) of the Act was proferred against the first respondent alone and the charge reads:

> Bahawa kamu pada 4bh Februari 2013 lebih kurang jam 6.40 pagi bertempat di tebing Sungai Pasir Putih, Tanjung Batu, Logpond, di dalam Daerah Tawau, di dalam Negeri Sabah, dalam memiliki dadah berbahaya iaitu Methamphetamine dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 12(2)Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 12(3) Akta yang sama.

A THE PROSECUTION'S CASE

[3] On 4 April 2013, at about 2am, a police marine from Tawau, Corporal Justin bin Lakai ('PW2') together with Corporal Isaac Amirul ('PW5') and Constable Alexise proceeded to a river bank at a place known as 'Logpond' at B Tanjung Batu. They went there in a civilian motorcar to verify an information received by PW2 pertaining to drugs trafficking activities that was going to take place there.

[4] Having taken their position there, at about 6.40am, a green Proton C Iswara bearing registration No SS7921F entered the ambush position and parked next to the marine police personnel's motorcar. There were two persons inside the Iswara motorcar. The driver was identified as Rosliansa bin Kitley ('the second respondent'), whilst the passenger at the front seat was identified as Romi bin Ali ('the first respondent'). D

[5] The second respondent came out from the Iswara motorcar and walked towards the river bank where he was arrested by PW5. When the first respondent was about to alight from the Iswara motorcar, he was arrested by PW2. According to PW2, the first respondent was attempting to flee. E

[6] PW2 conducted a search of the Iswara motorcar and found a black bag of 'Quiksilver' brand, exh P37, in the footwell of the front passenger seat where the first respondent was seated. Exhibit P37 had been placed close to the first F respondent's legs. PW2 examined P37 and found it to contain two plastic packets of 'Ali Café Power Root 5 Dalam 1'. In the first Ali Café plastic packet, PW2 found 11 translucent plastic packets containing crystalline substances suspected to be methamphetamines. In the second Ali Café plastic packet, PW2 found two silver-coloured plastic packets containing similar crystalline G substances suspected to be methamphetamines.

[7] After the discovery of the suspected drugs, PW2 proceeded to frisk the first respondent body and found another two small translucent plastic packets in the right front pocket of the jeans worn by the first respondent. These two H small plastic packets also contained similar substance suspected to be the drugs methamphetamines.

[8] Nothing incriminating was found on the person of the second respondent, other than the keys of the Iswara motorcar. The keys were seized I from him.

[9] All the exhibits were seized and both the respondents were subsequently taken to the Marine's Base at Tawau where a police report vide Tawau Rpt No 1963/12, P13 was lodged by PW2.

[10] The suspected drugs and other related items were handed over to the investigating officer, Insp Nalini a/p Narkeyah (PW6) at about 12.30pm on the same day.

[11] The suspected drugs in Ali Café plastic packets marked J1 to J11 and K1 and K2 were sent to the chemistry department at Kota Kinabalu on 6 February 2013 for analysis. Upon analysis by the government chemist, Biling ak Peter Raig (PW1), it was confirmed that the substances were methamphetamines, a dangerous drug as listed in the First Schedule of the Dangerous Drugs Act 1952, weighing a total amount of 1,115.96g.

FINDINGS OF THE TRIAL JUDGE

[12] The trial judge found that the prosecution has failed to prove direct trafficking by 'transporting' under s 2 of the Act to constitute the offence of trafficking in dangerous drugs under s 39B(1)(a) of the Act: see Gopal Sri Ram JCA (as he then was) in *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241; [2003] 2 CLJ 65 which summarised the law as enunciated by Lord Diplock in *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64; [1980] 1 LNS 181. The trial judge wrote at pp 190–191 of the appeal record as follows:

> From the evidence adduced in the instant case, there is no evidence from where the accused persons were alleged to have transported the said drugs to the scene at Logpond. Evidence only shows that the second accused was driving the said green Proton Iswara (P11) with the first accused seated at the front passenger seat arriving at Logpond. Although there is evidence from the owner of the said car that the second accused who is his wife's brother-in-law, had come to his house with another person to take the said car as there was someone who was interested to buy the said car and wanted to see it but the other person who came along with the second accused was not identified whether he was the first accused or some other person by the owner of the car. There was also no evidence that the second accused and/or the other companion was/were seen to have placed the black bag containing the drugs inside the car particularly at the floor of the front passenger seat after the second accused was handed the ignition key of the car. Hence, there is absolutely no valid reason to draw any inference that the drugs were 'transported' from the house of the car owner to Logpond. This basic element of transporting from one point to another is clearly not proved at the end of the PP's case. In addition, there is not an iota of evidence to show 'any transaction that the accused proposed to enter into' as stated in *Mohamad Yazri Minhat*'s case. To echo the words of His Lordship Gopal Sri Ram as cited above 'the fact that the accused is transporting a quantity of drugs from one point to another does not make him a trafficker'. The same position should apply in the instant case.

[13] However, the trial judge found that a reasonable inference can be drawn that the first respondent had knowledge of the drugs in exh P37, though His Lordship doubted the evidence of PW2 that the first respondent attempted

to flee. The trial judge, however, found that the first respondent was having custody or control of exh P37 containing the drugs which was recovered from the footwell of the front passenger seat where the first respondent was seated. The first respondent, therefore, had possession and presumed knowledge of the drugs in exh P37 under s 37(d) of the Act.

[14] As against the second respondent, the trial judge found there was no evidence that he was in custody or control of the drugs in exh P37. He was a mere driver of the Iswara motorcar which belonged to his wife's brother-in-law. Upon arrival at the scene at Logpond, the second respondent was exiting from the Iswara motorcar and walked to the river bank when he was apprehended by PW5. According to PW5, the second respondent attempted to run away but the trial judge found the evidence of the attempted flee alone was insufficient to infer that the second respondent had knowledge of the drugs in exh P37.

[15] The liability of the first respondent cannot be fastened or imputed to the second respondent based on the principle of common intention under s 34 of the Penal Code as there was insufficient evidence to prove any pre-arranged or pre-concerted plan. Neither had common intention arisen on the spot at the scene.

[16] Having found the above, the trial judge, at the close of the prosecution's case, reduced the trafficking charge against the first respondent to one of possession punishable under s 39A(2) of the Act. The first respondent pleaded guilty to the reduced charge and he was sentenced to 17 years imprisonment from the date of arrest and ten strokes of whipping. The first respondent also pleaded guilty to the amended charge of possession punishable under s 12(3) of the Act and he was sentenced to six months imprisonment to run from the date of arrest.

[17] As regard the second respondent, the trial judge found there was no evidence adduced by the prosecution to prove that the second respondent was in custody or control and having possession of the impugned drugs and thus, no prima facie case had been established against him. The second respondent was acquitted and discharged without calling for his defence.

THE APPEAL

[18] Learned deputy canvassed two issues before us. Firstly, the second respondent was at all material time, the driver of the Iswara motorcar. Exhibit P37 containing the drugs was seized from the floor of the front passenger seat where the first respondent was seated. Exhibit P37 was very close to the first respondent's legs. The first respondent's clothings were also seized from inside

P37. The first respondent and the second respondent were therefore had custody or control and knowledge of the drugs in exh P37. Learned deputy sought for the ratio in the Court of Appeal case of *Jonaidi bin Mansor v Public Prosecutor* [2002] 2 MLJ 111 at p 115; [2002] 1 CLJ 730 at p 733 and the presumption of possession under s 37(d) of the Act, to be applied in this situation.

[19] Secondly, learned deputy also submitted that the second and first respondents had common intention to traffick in dangerous drugs by 'transporting' under s 2 of the Act. Rosli bin Dalang, ('PW3') was the owner of the Iswara motorcar. It would appear that PW3 intended to sell his motorcar. PW3 handed over the said motorcar to the second respondent as the latter said he had a potential buyer to the Iswara motorcar. The second respondent came with an unidentified person to fetch the motorcar from PW3. According to PW3, he last used the said motorcar 3 days before the motorcar was detained by the police. While in his custody, PW3 kept the said motorcar under lock and key. The impugned drugs found in the motorcar was not his (ie PW3). As both the second and first respondents attempted to flee at the time of their arrest, common intention had arisen in that, both of them had knowledge of the drugs in the motorcar. The Court of Appeal cases of *Public Prosecutor v Mohd Bandar Shah bin Nordin & Anor* [2008] 4 MLJ 556; [2008] 4 CLJ 859, *Jamaluddin Saad & Anor v Public Prosecutor* [2013] 1 LNS 481 and *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241; [2003] 2 CLJ 65 were cited by learned deputy to support his contention.

OUR DECISION

[20] We are mindful that the prosecution has now filed an appeal to the Federal Court against our decision to confirm the order of acquittal of the second respondent at the close of the prosecution's case which was on the basis that no prima facie case has been made out against him.

[21] Before we embark upon a consideration of the evidence against the second respondent, firstly we need to state our decision against the first respondent. We did not agree with the trial judge that the prosecution has not proved trafficking by 'transporting' which was the reason for the reduction of the trafficking charge against the first respondent at the close of the prosecution's case to one of possession under s 39A(2) of the Act. We were of the view that the prosecution has proved its case of trafficking against the first respondent by transporting under s 2 of the Act. We, had therefore, set aside the decision of the trial judge reducing the charge under s 39A(2) of the Act and ordered the case against the first respondent be remitted back to the High Court for his defence to be called on an amended trafficking charge under s 39B(1)(a) of the Act (as was read out in court).

[22] As against the second respondent, it was the trial judge's decision that the prosecution had failed to prove that he was in possession of the impugned drugs. At p 193 of the appeal record, the question was posed: whether the first and second respondent were in possession of the drugs in exh P37 pursuant to a common intention? The fitting exercise of the clothings found in exh P37 were carried out on both the respondents. The clothings did not fit the second respondent but fitted the first respondent. It is reasonable to infer that the clothings together with the drugs in exh P37 belonged to or were in the possession of the first respondent only. The trial judge observed as follows:

> This bag was found on the floor of the front passenger seat where the first accused (first respondent) was seated. Although it was closed, it was unlocked and could therefore be easily unzipped by the first accused (first respondent) to notice the content in the said bag. This bag also contained, in addition to the two (2) packets of Ali Café, some clothings. Body fit of these clothings were carried out on both the accused (first and second respondent) and it was found that the clothings seemed to fit the first accused (first respondent) well *but not the second accused* (second respondent). (Emphasis added.)

[23] The trial judge went on to consider whether the second respondent had custody or control and therefore possession of the drugs in exh P37 and common intention to traffick in the said drugs. At p 196 of the appeal record, His Lordship wrote:

> As against the second accused, apart from the PP's contention of common intention (infra) and the fact that he was driving the car (P11), I find absolutely no evidence being adduced by the PP to prove that the second accused had custody or control of the drugs in the black Quiksilver bag. Evidence only shows that he had taken the said Proton Iswara car from the brother-in-law of his wife who intended to sell the car and he had driven the said car to the scene at Logpond. At the scene, he was allegedly seen to have alighted from the car and walked towards the river bank. Although PW5 said in evidence that the second accused attempted to run away when confronted by PW5, I do not find that even accepting PW5's evidence that itself is sufficient to constitute an overt act to allow this court to infer or imply custody or control or knowledge of the existence of drug in the black Quiksilver bag. Moreover, this evidence of PW5 seems to be contradicted by the evidence of PW2 who said that the second accused was arrested outside the car but without any evidence to explain as to where the second accused was actually arrested. Was second accused arrested just outside the car or was he arrested near the stall structure towards the jetty or the river bank and whether second accused had tried to run away when he was arrested by PW5? This doubt which was not erased by the PP must be resolved in favour of the second accused; see the cited case of *Tai Chai Keh v Public Prosecutor* [1948-1949] supp MLJ 105b at p 108 where Laville J held that where there is more than one inference, the inference most favourable to the accused should be adopted. To reiterate, there is also absolutely no evidence that the second accused was in whatever way linked to the black Quiksilver bag and the drugs in the Ali Café packets therein or any knowledge thereof apart from the mere fact that he was the driver of the green Proton Iswara.

> On the totality of evidence and upon a finding of fact, I find that PP has failed to prove a prima facie case against the second accused of custody or control of the said drugs for the presumption under s 37(d) of the DDA 1952 to be invoked against the second accused.

[24] The above passage showed that the trial judge made a finding of fact that there was insufficient evidence adduced by the prosecution to prove that the second respondent was in custody or control of the drugs in exh P37. The trial judge also entertained serious doubt regarding the exact spot the second respondent was arrested and whether the second respondent did actually make an attempt to escape at the time of his arrest by PW5. The evidence of PW5 had contradicted the evidence of PW2 on this issue. The second respondent, other than being the driver of the Iswara motorcar, there was no other evidence to show the second respondent's nexus with exh P37 and also his knowledge of the drugs in exh P37. On the totality of the evidence the trial judge found that the prosecution failed to prove presumed knowledge under s 37(d) of the Act against the second respondent. The prosecution evidence and the circumstances of the case was completely lacking to establish common intention between the second and the first respondent to jointly traffick in the drugs methamphetamines. In *Mohamad Yazri bin Minhat*'s case, Gopal Sri Ram JCA (as he then was) summarised trafficking by way of 'transporting' as follows:

> To summarise, the fact that the accused is transporting a quantity of drugs from one point to another does not make him a trafficker. Whether he is a trafficker in those circumstances of the given case, including the quantity of the drugs and any transaction the accused proposed to enter into.

[25] We did not find the trial judge to be in error and agreed that on the totality of the evidence adduced, the prosecution had failed to prove custody or control and presumed knowledge of the drugs under s 36(d) of the Act against the second respondent, let alone to fasten the second respondent with any 'common intention'. The trial judge decision to acquit the second respondent at the close of the prosecution's case was correct as no prima facie case of trafficking had been proven.

[26] Accordingly, we affirmed the second respondent's acquittal without having to call for his defence.

Case against first respondent remitted back to the High Court for his defence to be called; second respondent's acquittal affirmed without having to call for his defence.

Reported by Afiq Mohamad Noor